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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Weldas Company, L.P.

Serial No. 76462561

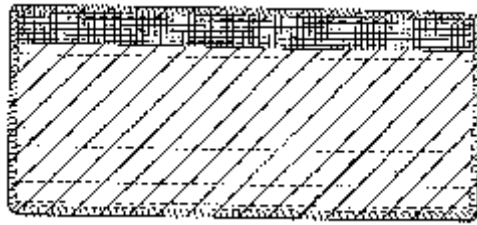
Melvin K. Silverman of Melvin K. Silverman & Assocs., P.C.,
for Weldas Company.

Amos T. Matthews, Trademark Examining Attorney, Law Office
108 (Andrew Lawrence, Managing Attorney).

Before Walters, Drost, and Zervas, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

Weldas Company, L.P. (applicant) filed an application
to register the mark shown below on the Principal Register
for goods ultimately identified as "protective helmet pads
incorporating sweatbands therein for purposes of cooling,
anti-vibration and comfort" in Class 9.



The application was filed on October 28, 2002, and it claimed a date of first use anywhere and a date of first use in commerce of March 1, 1994. The application as originally filed contains the following description of the mark: "The mark consists of a rectangle having a generally brown color and having a generally yellow linear strip along one major base thereof. A pattern having the appearance of stitching defines the periphery of the mark."¹

The examining attorney ultimately refused registration on the grounds that the design is functional under Section 2(e)(5) of the Trademark Act (15 U.S.C. § 1052(e)(5)). In addition, the examining attorney refused registration on the ground that "the proposed mark is not inherently distinctive and would not be perceived as a source indicator of applicant's goods." Brief at 2. The examining attorney explained that the "proposed mark is not distinctive. The proposed mark is not unique or unusual

¹ The lining appears to correspond to the standard color lining for the colors brown and yellow that were set out in previous USPTO rules. See 37 CFR § 2.52(e) (1997).

for ... protective helmet pads, it is a common basic shape or design for such goods." Final Office Action at 2.

After the examining attorney made the refusals final, an "Examiner's Amendment" was made and it inserted the following statement in the record: "The lining shown in the drawing is a feature of the mark and does not indicate color."

Applicant has sought review of the examining attorney's refusals.

We begin our discussion by reviewing the specimens of record. The following is applicant's specimen.



The enlargement of the bottom left hand corner reveals the mark for which applicant seeks registration.



Applicant's helmet pads as used on liners are shown below.



We briefly address the examining attorney's refusal on the ground that the mark is de jure functional. The examining attorney argues (Brief at 4) that the "record consists of advertising literature from applicant's website [example below] and www.google.com that praised the design advantages of its configuration."



However, we do not discern that the mark applicant is applying for is the configuration of its goods. Once the specimen is studied closely, the mark is not a depiction of the product and it is clear that applicant's mark is exactly what appears in the drawing, i.e., a design consisting of a rectangle with lining. However, in response to the refusal, applicant argues that its "product consists of several attributes which distinguish it from others, i.e., stitching, use of Velcro, the shape of the product, trade dress and other various distinctive attributes. As such, the representation of the product through a distinctive design is most capable of identifying the source and distinguishing it from other sources." Brief at unnumbered page 4. It is not clear what relevance these features of its product have to do with the

registrability of its mark, which is merely a rectangle design with lines. There is no evidence that applicant's product is a rectangle with lines, i.e., applicant's mark as it appears in the drawing and on the specimens is not a representation of the product. To the contrary, applicant's product appears to be a solid color, and its rectangular shape is longer and narrower than the rectangle depicted on the lower left corner of the specimens and in the drawing of the mark.²

In contrast, applicant's specimens show the mark as indicated earlier:



Therefore, we must reverse the refusal on the ground that the mark is functional because there simply is no evidence that the rectangle as shown above with lines is a depiction of the product or that it is otherwise de jure functional.

² Applicant also confusingly argues that "if one were to view the mark without further description of the product, he or she would probably not know what it is." Brief at unnumbered page 3. It is not clear why applicant's design would have to be recognized as anything other than what it is, i.e., a rectangle with lines.

Next, we will address the issue of whether applicant's design mark is inherently distinctive inasmuch as applicant seeks registration on the Principal Register.

[T]he question of inherent distinctiveness rests on whether the public in the relevant market would view Pacer's adhesive container cap as a source-identifier. See Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 210 [54 USPQ2d 1065] (2000) (stating that a mark is inherently distinctive if its "'intrinsic nature serves to identify a particular source'" (quoting Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992)); Tone Bros., Inc. v. Sysco Corp., 28 F.3d 1192, 1206 (Fed. Cir. 1994) (Trade dress is inherently distinctive if it "is of such a design that a buyer will immediately rely on it to differentiate the product from those of competing manufacturers").

In re Pacer Technology, 338 F.3d 1348, 67 USPQ2d 1629, 1631 (Fed. Cir. 2003).

The Federal Circuit, the CCPA, and the board have looked to the following factors to determine whether a design is inherently distinctive:

1. Whether the design was "a 'common' basic shape or design, whether it was unique or unusual in a particular field,
2. whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for goods, or
3. whether it was capable of creating a commercial impression distinct from the accompanying words."

Seabrook Foods, Inc. v. Bar-Well Foods, Ltd., 568 F.2d 1342, 196 USPQ 289, 291 (CCPA 1977)(footnotes omitted). See also Pacer Technology, 67 USPQ2d at 1631; In re Glaxo Group Ltd., 53 USPQ2d 1920, 1922 (TTAB 2000) ("In cases involving the alleged inherent distinctiveness of trade dress, the Board has in the past looked to Seabrook").

As used on the specimens, applicant's mark is not a simple background design. The case law suggests that simple background designs, even if it is not a product design, do not serve as inherently distinctive trademarks. In re E.J. Brach & Sons, 256 F.2d 325, 118 USPQ 308, 310 (CCPA 1958) ("We do not think that the average consumer of applicant's product will regard its background frills and curves as an unmistakable, certain, and primary means of identification pointing distinctly to the commercial origin of such product"); In re Anton/Bauer Inc., 7 USPQ2d 1380, 1383 (TTAB 1988) (Applicant's parallelogram background design not shown to have acquired distinctiveness); In re Hagggar Company, 217 USPQ 81, 84 (TTAB 1982) (Applicant's black rectangle with a serrated edge not inherently distinctive but registrable under Section 2(f)).

However, applicant's design is not a background design. It is an independent feature on applicant's specimen that is set apart from anything else. Applicant

has identified it with the TM symbol. In addition, the design contains parallel lines and cross-hatching. Under Seabrook Foods, there is no evidence that the mark as a whole is a common basic design or a "mere refinement of a commonly-adopted and well-known form of ornamentation." Furthermore, the mark as depicted on the specimen is clearly capable of creating a commercial impression separate and apart from any words on the specimen. Therefore, the examining attorney's refusal to register on the ground that the mark is not inherently distinctive is reversed.

Decision: The examining attorney's refusals to register are reversed.